IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Appellant,
vs.
OTIS E. MILES, et al,
Appellees.

No. ~~3886~~ 3686

THE UNITED STATES OF AMERICA,
Appellant,
vs.
R. J. NELSON, et al,
Appellees.

No. ~~3887~~ 3687

REPLY BRIEF OF APPELLANT UNITED STATES OF AMERICA

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division, in Admiralty.

JOHN T. WILLIAMS,
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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA, *Appellant,* vs. OTIS E. MILES, et al, *Appellees.*	No. 3886
THE UNITED STATES OF AMERICA, *Appellant,* vs. R. J. NELSON, et al, *Appellees.*	No. 3887

REPLY BRIEF OF APPELLANT UNITED STATES OF AMERICA

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division, in Admiralty.

In the opening briefs of the United States it was assumed that no salvage award could be made in these cases to the crews of the salving vessels on account of cargo, but the briefs of the appellees and

the oral argument of their counsel indicate that they are claiming not only for the salvage of the vessels involved but for the salvage of the cargo carried by them, although that cargo was not owned by the United States.

The decrees of the District Judge also show that he considered the salving of the cargoes in making the awards.

The contention of the United States that the salving of the cargoes is not an element in these cases and should not have been considered is not intended to be an admission that should it be held otherwise the awards actually made are not excessive. The argument made by the United States in the opening briefs that compensation for salvage services, where the values at risk are very large as in these cases, should not be fixed on the basis of those values, but on the basis of services rendered, is still insisted on.

The right of the appellees to sue the United States is based upon the Act of Congress of March 9, 1920, known as the "Suits in Admiralty Act." The first section of this act provides as follows:

> "That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and *no cargo owned or possessed by the United States* or by such corporation, *shall hereafter, in view of the provisions*

herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company."

The only effect of this section is to prohibit the seizure by judicial process of any vessel or cargo owned or possessed by the United States or by the corporation referred to.

The second section of the Act provides that in cases where if such vessel were privately owned or operated, or *if such cargo were privately owned and possessed,* a proceeding in admiralty could be maintained at the time of the action, *a libel in personam may be brought against the United States* or the corporation as the case may be, provided that the vessel is employed as a merchant vessel or is a tug boat operated by the corporation.

This is the provision of the act that creates the cause of action against the United States, and by its express terms it limits suit against the United States to cases where the cargo is both *owned and possessed* by the United States.

There is apparently a discrepancy between the language of section one to the effect that no cargo owned *or* possessed by the United States shall be subject to arrest or seizure, and that contained in section two which limits the suit authorized to cases where the cargo is owned *and* possessed, but this apparent discrepancy disappears if the word "pos-

sessed'' is given a meaning somewhat broader than a mere naked possession, such as a carrier of goods would have who has no interest whatever in the goods themselves, and giving to the word ''possessed'' that broader interpretation will harmonize the two sections.

Such a construction was given to the word ''possession'' in the case of *Emerson v. State,* 25 S. W. 289, 290, where the court held that ''possession'' and ''custody'' are not convertible terms, and that *to constitute possession mere temporary custody is not sufficient but there must be combined with it the control, care and management of the property.*

The United States did not own the cargo aboard the vessels at the time they were salved. It does not appear that the United States had the slightest interest in that cargo even to the extent of unpaid freight moneys. Had the vessels and their cargo been ''privately owned,'' using the language of the statute, the owner of the vessels would not have been liable in admiralty for the salvage of the cargo unless they also owned it. As the United States did not own the cargo and so far as the record shows had no interest in it, it certainly should not be held liable for the cargo's salvage.

Section three of the ''Suits in Admiralty Act'' says that *the suits* instituted against the United States *shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between pri-*

vate parties. Under no existing principle of law or rule of practice could the owner of a vessel be held liable for the salvage of cargo on that vessel when the cargo was not owned by him and he had no interest whatever in it.

It is respectfully submitted that the Act does not create any liability against the United States on account of the salvage of cargo in these cases.

Dated, San Francisco, California,
October 29, 1921.

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